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EPA Region 5 Records Ctr.



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To "Morgan, James L." <JMorgan@atg.state.il.us>, Elise.Feldman@usdoj.gov, Jason.Barbeau@usdoj.gov, "Brooks, Patrick J." <PBrooks@ssd.com>
cc Thomas Martin/R5/USEPA/US@EPA, Catherine Garypie/R5/USEPA/US@EPA, Bruce Kugler <Bruce.Kugler@epa.state.il.us>

bcc

Subject RE: Eagle Picher Custodial Trust Issues

Thanks Jim. We will respond shortly.

From: Morgan, James L. [mailto:JMorgan@atg.state.il.us]
Sent: Wednesday, May 24, 2006 11:17 AM
To: Winters, Karen; Elise.Feldman@usdoj.gov; Jason.Barbeau@usdoj.gov
Cc: Martin.Thomas@epamail.epa.gov; Garypie.Catherine@epamail.epa.gov; Bruce Kugler
Subject: Eagle Picher Custodial Trust Issues

Many of the issues Illinois would have raised have been raised and/or addressed by comments from others. Illinois remains concerned about several issues. They are:

- 1) *Independence of the Custodial Trustee:* We understand EP's desire to utilize Mr. Harper's past experience and knowledge but remain concerned about assuring independence of the Trustee. As currently written, the Trust agreement allows the Trustee to work for other entities (Sections 4.6 and 4.7) which could include any of the "NewCos" or existing EP creditors/beneficiaries of the Custodial Trust. This creates a potential for divided loyalties since decisions made about work at Galena or other sites could affect distributions to Trust beneficiaries. As for Mr. Harper, I am unclear whether he would retain any interest in a pension or other obligation the NewCos are assuming after approval of the Reorganization Plan and whether there is the potential for distribution into such accounts from the Custodial Trust.
- 2) *Section 6.4 Prevailing Parties:* Caselaw in Illinois makes it clear that the State cannot be sued for monetary claims unless it has been authorized by the General Assembly. Courts have rejected claims even when based upon a contract executed by the State. I cannot find any authorization by the General Assembly for Illinois EPA or the Attorney General to reimburse a party for litigation expenses when there has been a good-faith exercise of authority on their part. Accordingly, we cannot agree to this provision (and more importantly, even if we did, we would not be bound by it).
- 3) *Section 2.7 Termination:* Illinois will not accept the real estate at Galena. I will consult with the County to determine if they are interested. I am also concerned about what impact abandonment by the Trustee may have on the continued vitality of land use restrictions.
- 4) *Section 5.1 Liability of the Custodial Trustee.* The use of "Party" in the first sentence of this provision seems inappropriate since "Party" has a broader connotation than just the Custodial Trustee, and any member, employee, officer and director of the Custodial Trustee. I think we should use the latter phrase instead. The parenthetical (b) shall not be considered to be the owner or operator as defined in 42 U.S.C. 9607(20) of any properties may undermine any land use restrictions imposed as part of a CERCLA remedy if the Custodial Trustee as grantor is holding himself out to not be the owner. The parenthetical (a) has also misspelled state.
- 5) *Section 6.11 Amendment of the Trust:* This section seems unclear as currently written. Is it intended to mean that amendments of administrative provisions, even if mutually agreed to, will be effective only after notice and opportunity to object. If so, I would make that the first sentence and then change the current first sentence to insert "other as the second word. I would then start a new paragraph with the third sentence and insert the following at the start. "When the Trustee

seeks to amend an administrative provision of general applicability or if a request for mutual agreement to amendment of another provision has been rejected, “ This should clarify the procedure as well as making sure that the States have an adequate opportunity to contest an amendment request.

If you have any questions please call me at 217-524-7506 or email me.

Jim Morgan